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In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA, ET AL.,
Petitioners,
v.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, MICHIGAN, MONTANA, SOUTH DAKOTA, UTAH, WISCONSIN AND WYOMING IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a treaty provision giving Indian bands the right to hunt and fish "during the pleasure of the President" creates only temporary rights that are extinguished when a State is admitted to the Union on an equal footing with the original 13 States.

2. Whether a treaty ceding to the United States "all right, title and interest of whatsoever nature" in previously ceded territory abrogates hunting and fishing rights reserved in the previous treaty under the rule set forth in *Oregon Department of Fish and Wildlife* v. *Klamath Indian Tribe*.

3. Whether the President acted within the scope of his authority when he revoked Indian hunting and fishing rights that had been guaranteed by treaty "during the pleasure of the President of the United States."

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INTEREST OF AMICI

The States represented in this brief have a trust responsibility, arising from their sovereignty, for the management of their fish and wildlife. Experience shows the difficulties in successfully filling this role in an increasingly complex and hostile environment. The health, and very existence of many species of fish, plants, and wildlife are in jeopardy, and state fish and game programs are the front line of defense. Effective preservation requires a deep scientific understanding of how each element of an ecosystem functions, and how it affects other elements; it also requires the balancing of competing policy goals.

Stewardship for these resources is difficult enough without the complications added by the decision below. The lower court opinions unnecessarily foster a second program for the management of fishing, hunting, and gathering; one administered by a district court that will be the ultimate arbiter of the necessity for, and reasonableness of, a given regulation. This program uneasily exists within the State, but not as part of it. State fish and game managers will have to make their decisions mindful of unquantified Indian rights to the same resource. In the event of disagreement, the final decision will be made not by resource experts, but by the court.

This scheme—so antithetical to the federal system—is unnecessary, undesirable, and inconsistent with the intent of Congress and the Executive, as well as the decisions of this Court.

SUMMARY OF ARGUMENT

Under our constitutional scheme, the federal government bears a duty to the States to respect their sovereignty, and to refrain from ceding away those lands and resources that make up that sovereignty unless international obligations or public exigency require.

The natural resources at issue here passed to the States

when they became sovereigns. The original thirteen States acquired them at the time of independence. Later States acquired them under the constitutional equal footing doctrine, not by the grace of Congress. All States hold these resources in trust for all their people.

Congress held these resources in trust for the future States. While it could make pre-statehood conveyances of them, this Court has exercised a presumption against such grants, and required that they must be made in the clearest and most unequivocal terms. The treaty at issue in this case reserved for the Bands the privilege of hunting, fishing, and gathering wild rice "during the pleasure of the President" throughout lands the Indian tribes ceded to the federal government. *That language does not satisfy the rigorous standard requiring an unequivocal expression of intent to defeat Minnesota's sovereign interest in the resources.*

Instead, the treaty between Congress and the Bands defined the rights in transitory terms, and Congress made no other provision for rights that would survive Minnesota's admission to statehood. The Court should not imply a reservation of tribal hunting and fishing rights into the act admitting Minnesota to the Union. *See Ward* v. *Race Horse*, 163 U.S. 504, 511 (1896). Respondents attempt to distinguish *Ward* by noting that the treaty language there is different from the language here. This attempt at distinction is unpersuasive: the language describing the rights in this case anticipates termination of the rights, just as the treaty language in *Ward* did. Thus, even if the terminating condition is different (occupation of unoccupied lands in *Ward*, presidential termination here), in both cases the rights are temporary rights that do not exist after admission to statehood.

This rule, under which courts do not infer Congressional intent to interfere with state sovereignty over their fish and wildlife, was intended to prevent serious intrusions into States' difficult policy judgments. Such intrusions not only interfere with the crucial work of state resource conservation agencies, they also place the courts in a policymaking role. The concurrent micromanagement of fish and wildlife by State, tribal band, and federal court established by the decisions below is inherently troublesome, inconsistent with the decisions of this Court, and anathema to the federal system.

Independent of the effect of Minnesota's admission to the Union, the Bands by treaty gave up the usufructuary rights they seek to protect here, along with "all right" in lands they ceded. Though respondents argue that "all right" does not mean "all right," this Court previously rejected respondents' argument in the context of almost identical treaty language. *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753 (1985). There, the Court relied on a number of grounds, but central to its decision was the plain language of the treaty. The treaty language here is just as plain. As a result, the Bands' usufructuary rights were extinguished even prior to statehood.[1]

ARGUMENT

I. THE STATES' INTEREST IN MANAGING FISH AND GAME IS A CORE ATTRIBUTE OF THEIR SOVEREIGNTY

A. The Original Colonies Acquired Their Fish and Wildlife as an Attitude of Sovereignity, and the Other States Entered the Union on an Equal Footing with the Original States

> "When the Revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the

1. This brief does not address the question presented concerning interpretation of the presidential order; petitioners' brief amply discusses that issue.

> Constitution." *Martin* v. *Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410, 414 (1842).

These rights include the power to regulate the public fisheries and other wildlife. *Id.* at 413-414.

These sovereign state powers were extended to newly admitted States under the equal footing doctrine. *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212, 230 (1845). Therefore, the original and later-admitted States alike exercise police power over their natural resources and, insofar as they are capable of ownership, dominion over them in their sovereign capacity on behalf of the people. *Geer* v. *Connecticut*, 161 U.S. 519, 522-28 (1896), *overruled on other grounds*, *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979); *see also Ex parte Maier*, 103 Cal. 476, 483, 37 P. 402 (1894).

This power to manage and regulate fish and wildlife resources is an attribute of sovereignty that can be traced to Greek and Roman law. *Geer*, 161 U.S. at 522-23. The authority to control and regulate the taking of game existed in England "from the earliest time," and the colonies were vested with this power, "as a trust for the benefit of the people." *Id.* at 527-29; *accord Lacoste* v. *Dep't of Conservation*, 263 U.S. 543, 549 (1929).

The principle that underlies the equal footing doctrine and the strong presumption of state ownership is that navigable waters uniquely implicate sovereign interests. And throughout the doctrine's lengthy history, from the time of Justinian, Bracton, and the Magna Carta, the fisheries have been an integral part of the doctrine. *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2041 (1997).

States do not have title to fish and wildlife in the conventional sense, so as to defeat commerce clause inhibitions, *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979). Still, their power to regulate those resources remains unquestioned:

> "[T]he retained interests of States in such common resources as fish and game are of substantial legal moment, whether or not they rise to the level of a traditional property right. The range of regulations which a State may invoke under these circumstances is extremely broad. Neither mere displeasure with the asymmetry of the pattern of state regulation, nor a sensed tension with a federal statute will suffice to override a state enactment affecting exploitation of such a resource. Barring constitutional infirmities, only a direct conflict with the operation of federal law . . . will bar the state regulatory action." *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 288 (1977) (Rehnquist, J., concurring in part and dissenting in part) (citations omitted).

B. Fish and Wildlife, Like the Navigable Waters of a State, Are Held in Public Trust on Behalf of All the People

Wild animals, fish, and other natural resources are held by the State in its sovereign capacity, for the common benefit of all the people. *Lacoste,* 263 U.S. at 549. This Court has long acknowledged the power and responsibility of States to regulate the fisheries within their borders on behalf of their people. *McCready* v. *Virginia*, 94 U.S. 391, 394-95 (1876). The fisheries are directly part of the States' public trust interest in its navigable waters: "The State holds the propriety of its soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery." *Smith* v. *Maryland*, 59 U.S. (18 How.) 71, 75 (1855); *see also Phillips Petroleum Co.* v. *Mississippi & Saga Pet.*, 484 U.S. 469, 476 (1988).

The protection of wildlife within a State "is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection." *Lacoste*, 263 U.S. at 552.

The States' public trust interest in their wildlife gives them not only the right to manage this resource on behalf of all their people, but also an affirmative duty to do so.

As a fiduciary, the States may bring actions and recover damages for injuries to the trust res, whether it be water or the fish or animals dependent on it. *Maryland Dep't of Natural Resources* v. *Amerada Hess Corp.*, 350 F. Supp. 1060 (D. Md. 1972); *In re Steuart Transportation Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980).

C. The Federal Government Holds These Resources in Trust for the Future States; While Congress May Make Pre-statehood Reservations, Its Intent to Do So Must Be Expressed in the Most Clear and Unequivocal Terms

Congress has the power to commit these resources prior to statehood when it becomes necessary "to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *Shively* v. *Bowlby*, 152 U.S. 1, 48 (1894). Its intention to do so, however, must be expressed in clear and unequivocal terms. The consistent scheme for such resources is that they shall not be granted away "*unless in case of some international duty or public exigency* (italics added)," and are held for the future State "for the purpose of being ultimately administered and dealt with for the public benefit by the State." *Id.* at 50.

Such reservations are "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank*, 270 U.S. 49, 55 (1926). They require a showing (1) that Congress clearly intended to include the lands at issue in the grant or reservation, *and* (2) that Congress affirmatively intended to defeat the future State's title. *Utah Div. of State Lands* v. *United States*, 482 U.S. 193, 202 (1987).

A State's dominion over navigable waters is "so identified

with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign . . . or transfer of sovereignty itself." *United States* v. *Oregon*, 295 U.S. 1, 14 (1935). This canon of construction applies even when Indian tribes are involved. *See Holt State Bank*, 270 U.S. at 49.

This Court recently applied its accepted rule of construction to the Big Horn River and concluded that at the time of the treaties, no "public exigency" existed "which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States." *Montana* v. *United States*, 450 U.S. 544, 556 (1981);[2] *see also Wisconsin* v. *Baker*, 698 F.2d 1323, 1334-

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2. The Ninth Circuit recently held that the equal footing doctrine had been applied only to navigable waters, and not to fishing rights. *See United States* v. *Washington*, 135 F.3d 618, 632-33 (9th Cir. 1998). That court ignored the cases applying the doctrine to other natural resources. *See, e.g., Ward* v. *Race Horse*, 163 U.S. 504 (1896); *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 411 n.12 (1968). It additionally ignored the conceptual contradictions of its approach, given the more general cases (cited above) holding that States have sovereign interests in fish and wildlife, just as they have sovereign interests in navigable waters. Fisheries, for example, are an inherent part of the trust in which navigable waters are held. *See Smith* v. *Maryland*, 59 U.S. (18 How.) 71 (1855); *see also United States* v. *Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502 (9th Cir.), *cert. denied*, 502 U.S. 956 (1991) (mere dependence on river insufficient to establish tribal ownership absent evidence United States intended to include riverbed in reservation). *Washington* also cited *Winans* in support of its contention that presumption of the equal footing doctrine did not apply to hunting and fishing rights. In fact, *Winans'* statement that Congress can create permanent rights, 198 U.S. at 383, is entirely consistent with the doctrine, as is *Winans'* determination that the language defining anadromous fishing rights created a permanent easement, 198 U.S. at 381.

The Eighth Circuit in this case applied the doctrine (though it found the presumption to have been overcome), and Respondents do not challenge the application.

35 (7th Cir.), *cert. denied*, 463 U.S. 1207 (1983). It reached this conclusion notwithstanding treaties setting apart reservation lands "for the absolute and undisturbed use and occupation" of the Tribe, and providing the Tribe did "not surrender the privilege of hunting, fishing, or passing over any of the tracts of country" referred to in them. *Montana*, 450 U.S. at 553. Congress' recognition in the 1837 treaty of certain privileges "subject to the pleasure of the President" does not show an intent to defeat the State's assumption of sovereignty.

II. THE BANDS' USUFRUCTUARY RIGHTS BECAME SUBJECT TO FULL STATE REGULATION UPON MINNESOTA'S ADMISSION TO THE UNION IN 1858

The equal footing doctrine compels a conclusion that Congress did not intend the Bands' usufructuary rights to be immune from ordinary state regulatory authority upon Minnesota's admission to the Union. Congress had the power to reserve the usufructuary rights to the Bands free from state regulation beyond statehood, but did not exercise that power by an express permanent reservation.

A. The Bands' Usufructuary Rights Were Extinguished by Minnesota's Admission in 1858 Because Congress Neither Created Permanent Usufructuary Rights at the Time of the Treaty, nor Reserved Such Rights to the Bands in the Act of Admission

The federal government, in drafting the 1837 treaty, did not include language indicating that the rights would survive statehood, or more generally, that the rights were intended to be permanent in the sense of being immune from the ordinary application of state law. *Cf. United States* v. *Winans*, 198 U.S. 371, 380-81 (1905) (language providing for

contingencies of future ownership of land made anadromous fishing rights continuing against United States and grantees, and State and grantees). Nor did Congress include any language in the act of admission that could plausibly be read as reserving the usufructuary rights to the Bands. *Cf. Ward* v. *Race Horse*, 163 U.S. 504, 511 (1896) ("The act which admitted Wyoming into the Union, as we have said, expressly declared that the State should have all the powers of other States of the Union, and made no reservation whatever in favor of the Indians."). Thus, under *Ward*, with statehood came the right to regulate the Bands' hunting and fishing in the same manner as those of non-Indians—a principle reflected by this Court's holding that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-49 (1973).

Although the central equal footing question is whether Congress explicitly reserved permanent usufructuary rights for the Bands, respondents have argued that the rights were not *intended* to be "temporary." Notably, respondents have identified no treaty language suggesting that the rights were intended to be permanent. Instead, they have attempted to distinguish the treaty language in this case and the treaty language in two other cases reaching different results. *Ward* v. *Race Horse*, 163 U.S. 504 (1896); *Crow Tribe of Indians* v. *Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996).

In fact, *Ward* and *Repsis* are directly on point, even if it is possible to point to differences in their facts. In both of those cases, as here, the rights in *Ward* and *Repsis* were temporary because the treaty creating the rights anticipated events that would terminate the rights. In *Ward* and *Repsis*, the event was occupation of public lands; here, it was a presidential revocation. That the extinguishing events were different does not change their character as extinguishing

events, and does not make their rights any less temporary.

Respondents have attempted to distinguish *Ward* and *Repsis* on the basis that the rights were tied to the United States' ownership of the lands. *Mille Lacs Band of Chippewa Indians* v. *Minnesota*, 124 F.3d 904, 927 (8th Cir. 1997). According to respondents' analysis, since the rights concerned "unoccupied lands of the United States," one would naturally assume that the rights in *Ward* and *Repsis* would disappear at such time as the lands were no longer lands "of the United States," i.e., at admission. *Id.*

If anything, the rights here are even more "temporary" than the rights in *Ward* and *Repsis*. In those cases, the courts inferred from the use of the word "unoccupied" that the rights would terminate when the unoccupied lands became occupied. Here, no inference is necessary: the rights exist only "during the pleasure of the President." *Ward* and *Repsis* are controlling.

The Seventh Circuit examined the same rights at issue here, and determined that they were not permanent. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Voigt*, 700 F.2d 341, 355 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983).

Finally, the impermanent nature of the rights under the 1837 Treaty distinguishes this matter from *United States* v. *Winans*, 198 U.S. 371 (1905). There, this Court concluded that an 1855 treaty with the Yakima Nation was intended to reserve to the tribe an easement over privately owned lands to reach and to fish from "usual and accustomed places." In so concluding, the Court construed the treaty as "impos[ing] a servitude upon every piece of land as though described therein" and as "foresee[ing] and provid[ing] for" the "contingency of the future [private] ownership of the lands." *Id.* at 381.

Here, in contrast, respondents claim no comparable easement over private land; they instead recognize that landowners may close their property to hunting and fishing activities generally and that tribal members are bound by

such determination. The situation is thus strikingly similar to that in *Ward*, where the Court commented upon the anomaly of an argument that, "after [land] had become subject to state authority, admits that the privilege would cease by the mere fact that the United States disposed of its title to any of the land, although such disposition, when made to an individual, would give him no authority over game, and yet that the privilege continued when the United States had called into being a sovereign State, a necessary incident of whose authority was the complete power to regulate the killing of game within its borders." *Ward*, 163 U.S. at 510. In sum, unlike *Winans*, this is not a situation in which "the United States, while it held the country as a Territory, . . . create[d] rights which would be binding on the States." *Winans*, 198 U.S. at 383.[3]

B. Implementation of the Usufructuary Rights Conflicts with State Sovereignty

This case presents a patent conflict between usufructuary rights and state sovereignty. The Bands have become the primary rulemaking and enforcement authority for their own off-reservation hunting and fishing. *See Mille Lacs Band of Chippewa Indians* v. *Minnesota*, 952 F. Supp. 1362,

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3. *Winans* is also distinguishable because, unlike this matter, it did not involve the question of state regulatory authority over the exercise of off-reservation fishing or hunting rights. *See Winans*, 198 U.S. at 384. The Court held only that the 1855 treaty right "fix[ed]" in "usual and accustomed" fishing locations "such easements as enables the right to be exercised." *Id.; see also New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556, 563-64 (1916) (relying on Winans for the holding that, although treaty reserved "a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended," such privilege was subject to "that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised").

1367 (D. Minn. 1997) (Bands governed by their own Conservation Code). The district court enjoined Minnesota from enforcing against the Bands various state laws, laws that Minnesota in its sovereign judgment believes are important. *See id.* at 1379-82 (prohibiting on shining deer in December); *id.* 1382-84 (limitations on gillnetting). The district court required Minnesota to justify its regulations by proving they were necessary "to forestall the imminence of extinction." *Mille Lacs*, 952 F. Supp. at 1382. The excruciating and minute analysis of each specific conservation measure illustrates both the magnitude of this impingement on Minnesota's sovereignty and its impracticability.

The existence, within a State, of two concurrent resource management programs, one tribal and one state administered, subject in the event of disagreement or inconsistency to the final decision of a federal judge, is unworkable and unnecessary.

Nondiscriminatory state regulations applied to Indians outside of Indian country are presumed valid "in the absence of express federal law to the contrary (internal quotation marks omitted)." *Klamath*, 473 U.S. at 765 n.16; *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973); *Salt River Pima-Maricopa Indian Community* v. *Yavapai County*, 50 F.3d 739, 740 (9th Cir. 1995); *United States* v. *Washington*, 520 F.2d 676, 684 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). The Court has held repeatedly that Indian hunting and fishing rights are subject to state regulations of general applicability. *See Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 398 (1968); *Kake Village* v. *Eagan*, 369 U.S. 60, 75 (1962); *New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556, 563-64 (1916).

Even the cases upon which respondents have relied allow that tribal usufructuary rights must be subject to state regulation. *Winans* was careful to explain that, in holding that the United States had reserved usufructuary rights for the Indians, it was *not* holding that a State was without power to regulate the exercise of the rights:

> "And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possess as `taking fish, at all usual and accustomed places.' Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised." 198 U.S. at 384.

Tulee objected to regulations only insofar as they accomplished purposes other than resource management. *Tulee* v. *Washington*, 315 U.S. 668 (1942). Thus, it refused to bar regulations governing the use of the resources:

> "The treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish." 315 U.S. at 684.

It rejected, however, the State's argument that it could charge license fees, because a stated purpose of the license fees was to raise revenue for the state government. 315 U.S. at 685.[4]

To add additional dimensions to judicial review of state resource regulations is to assign a policymaking role to the courts for which they are not well equipped. This Court

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4. Some lower courts have read the *Tulee* language to authorize greater judicial oversight of regulations than *Tulee* intended. As noted previously, *Tulee* distinguished between regulation that only managed resources, and regulation that served other purposes, such as revenue. The *Tulee* language should not be read to require courts to make policy decisions about what steps are necessary for the conservation of a resource. Nor should "conservation" be construed as the equivalent of "non-extinction." Once a court has determined that a regulation is directed at resource management rather than some other goal, it should not make policy determination of optimal resource levels or the effectiveness of alternate regulatory regimes.

and lower courts have repeatedly eschewed policymaking roles. *See, e.g.*, *Missouri* v. *Jenkins*, 495 U.S. 33 (1990) (ordering a specific tax levy to facilitate school desegregation not an appropriate judicial action); *Rhode Island Handicapped Action Committee* v. *Rhode Island Pub. Transit Auth.*, 718 F.2d 490, 497-98 (1st Cir. 1983) (state and federal administrators, rather than judges, "are charged with devising the nuts and bolts of transportation programs for the handicapped"); *National Coal Ass'n* v. *Marshall*, 510 F. Supp. 803, 805-06 (D.D.C. 1981) (case non-justiciable because court would be required to make benefit eligibility determinations, and otherwise manage federal benefits programs).

III. THE MILLE LACS BAND'S USUFRUCTUARY RIGHTS WERE EXTINGUISHED EVEN PRIOR TO ADMISSION TO STATEHOOD

The Mille Lacs Band and Congress agreed in the 1855 Treaty that the Bands would convey "all title, and interests right, . . . in, and to any other lands in the Territory of Minnesota or elsewhere." *Mille Lacs Band of Chippewa Indians* v. *Minnesota*, 124 F.3d 904, 920 (8th Cir. 1997). The Bands argue that somehow "all right" does not encompass usufructuary rights, basing their argument on some of the surrounding historical circumstances. This contention is contrary to the plain meaning of the 1855 Treaty. While a court may examine evidence of Indian understanding of a treaty to the extent that the treaty contains ambiguous terms, courts should not substitute their sense of Indian intent for the plain terms actually agreed to. *Choctaw Nation* v. *United States* 318 U.S. 423, 432 (1943) ("But even Indian Treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.").

This Court recently considered treaty language essentially identical to the treaty language in this case, and found that

language to be clear, notwithstanding evidence of a contrary understanding held by the Indians who were parties to the treaty. *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753 (1985). There, a 1901 agreement between the Klamath Tribe and the United States provided that the tribe would "cede, surrender, grant, and convey to the United States all their claim, right, title and interest in and to" land erroneously excluded from the tribe's reservation. The Court determined that, although this language did not explicitly address usufructuary rights, it should be read to surrender such rights. The Court explained that the language of the 1901 Treaty unambiguously ceded all rights:

> "[T]he 1901 Agreement contained a broad and unequivocal conveyance of the Tribe's title to the land and a surrender of a `*all* their claim, *right*, title, and interests *in and to*' that portion of the reservations. 34 Stat. 367 (emphasis added) (footnote omitted). The 1901 Agreement thus was both a divestiture of the Tribe's ownership of the ceded lands and a diminution of the boundaries of the reservation within which the Tribe exercised its sovereignty. In the absence of any language reserving any specific rights in the ceded lands, the normal construction of the words used in the 1901 Agreement unquestionably would encompass any special right to use the ceded lands for hunting and fishing." *Klamath*, 473 U.S. at 768.

The Court noted that the nature of the rights, and the wording and effect of other treaties between the parties also supported its conclusion. Thus, for example, the fact that the usufructuary rights had been exclusive "unequivocally confirmed" the decision required by the plain language. *Id.*

The Mille Lacs Band's focus on extrinsic evidence of the parties' contemporaneous understanding of the treaty lan-

guage, and rejection of the plain meaning of that language, is thus at odds with *Klamath*.

Several other courts reached conclusions similar to *Klamath's* based on similar language. *E.g.*, *Red Lake Band of Chippewa Indians* v. *Minnesota*, 614 F.2d 1161 (8th Cir. 1980), *cert. denied*, 446 U.S. 905 (1980) "The decision below threatens the reliance of states and tribes on Klamath and will likely open up jurisdiction disputes with regard to disestablished and diminished reservations thought long settled."; *State* v. *Thompson*, 355 N.W.2d 349 (S.D. 1984).

CONCLUSION

Under our federal system, the States are trustees of their navigable waters and their fish and game. They hold these resources for all of their people, and bear both the power and responsibility as trustees to manage and preserve them effectively. These resources are an inherent attribute of their sovereignty.

For these reasons, this Court has been properly reluctant to attribute to Congress any intent to defeat States' stewardship. The traditional test should be applied to the treaties, executive order and acts of Congress at issue here. The result will be to restore that balance to the federal system given it by the drafters of the Constitution and allow Minnesota to manage its resources for all of its people.

The Court should reverse the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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